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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-1751

WALTER D. ZANT, Warden,

Petitioner,

vs.

JACK HOWARD POTTS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF FOR RESPONDENT IN OPPOSITION

PAMELA L. J. ARANGNO
MILLARD C. FARMER
JOSEPH M. NURSEY
ANDREA I. YOUNG
15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303
(404) 688-8116

FRANK DERRICKSON
RALPH GOLDBERG
THOMAS MCKEE WEST
600 Healy Building
57 Forsyth Street
Atlanta, Georgia 30303
(404) 524-1293

COUNSEL FOR RESPONDENT

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The Respondent, Jack Howard Potts, respectfully prays that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, Unit B, entered on February 17, 1981 be denied.

Petitioner adequately sets forth the citations to the opinions below and the jurisdiction of this Court in his petition.

## QUESTION PRESENTED

Whether this Court should review the Circuit Court's limited and virtually interlocutory decision remanding this 28 U.S.C. §2254 case back to the District Court for an evidentiary hearing on the issue of abuse of the writ and voluntary dismissal of a prior 28 U.S.C. §2254 action.

## STATEMENT OF THE CASE

Respondent, Jack Howard Potts ("Jackie Potts") was convicted of kidnapping,[1] aggravated assault and two counts of armed robbery in the Superior Court of Cobb County, Georgia on March 11, 1976, and was sentenced to death. Subsequently, he was convicted of murder in the Superior Court of Forsyth County on July 14, 1976 and was given a second death sentence. Both convictions and sentences were imposed for a single incident.

The two cases were consolidated on appeal by the Supreme Court of Georgia, which affirmed in Potts v. State, 241 Ga. 67, 243 S.E. 2d 510 (1978). Although Jackie Potts, an indigent, desired to file a petition for writ of certiorari in the United States Supreme Court, his attorneys failed to do so.

On November 14, 1978, Jackie Potts filed a habeas corpus petition in the Superior Court of Tattnall County, Georgia, for both of the convictions and sentences of death. On July 24, 1979, all relief was denied by the Superior Court of Tattnall County.

Application for certificate of probable cause to appeal the denial of the habeas corpus petition was filed in the Supreme Court of Georgia on August 9, 1979. Subsequently,

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[1] The United States Court of Appeals for the Fifth Circuit incorrectly stated that Potts had been convicted of "kidnapping with bodily injury" 638 F.2d 727, 729 (5th Cir. 1981)(Appendix 4, 5). The same inaccuracy appears in the decision of the Georgia Supreme Court, Potts v. State, 241 Ga. 67, 88, 243 S.E. 2d 510 (1978). Potts was only convicted of simple kidnapping in Cobb County which is not a capital felony in Georgia. See, Coker v. Georgia, 433 U.S. 584 (1977). Patrick v. State, 247 Ga. 168, 274 S.E. 2d 570 (1980).

In the Superior Court of Cobb County, the State of Georgia attempted to use the homicide which is the basis of the Forsyth County conviction of murder as an aggravating circumstance for the kidnapping. The Cobb County jury was charged on murder as an aggravating circumstance for the kidnapping but did not find the homicide as an aggravating circumstance. The State of Georgia then crossed the Cobb County line into Forsyth and was successful in obtaining a murder conviction using the homicde earlier rejected by the Cobb County jury.

Jackie Potts discharged his attorneys and requested them to withdraw the pending applications.[2] Although counsel communicated this request to the Supreme Court of Georgia, they conveyed to that court the strong possibility that Potts was acting under duress because of certain chronic, unattended medical problems.

On January 8, 1980, the Supreme Court of Georgia granted Jackie Potts' request to discharge his attorneys, denied his motion to withdraw the applications for certifcate of probable cause, and denied the applications.

Execution dates were set in both cases for February 15, 1980. On February 13, 1980, Governor George Busbee, acting upon a request from the State of Georgia Pardon and Parole Board which was neither initiated by nor consented to by Jackie Potts, granted a ninety day stay pending clemency consideration. Jackie Potts not only did not initiate or consent to the stay granted by Governor Goerge Busbee, but in addition declined to cooperate with attorneys seeking to pursue clemency on his behalf.[3] After a proceeding on April 24, 1980 at which Potts was unrepresented, clemency was denied on May 1, 1980.

Execution dates were then set in both cases for June 5, 1980. Then Jackie Potts sought the first ever federal review of his sentences of death in a petition filed in the United States District Court for the Northern District of Georgia, Atlanta and Gainesville Divisions, on June 4, 1980, less than sixteen hours before his scheduled execution. Potts v. Austin, Case Nos. C80-964A and C80-46G. The procedural history of his cases reflects the struggles of a tormented person to

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[2] Potts was not represented at this time by present counsel.

[3] The attorneys seeking to assist in the clemency proceedings were not present or past attorneys of Potts. They were attorneys from a State of Georgia agency, the Georgia Indigent Defense Counsel.

reconcile his desire for life with his intense feeling of remorse for his past conduct.

Since 1975, Jackie Potts has suffered unrelenting physical pain from a bullet wound received from the .357 magnum pistol of the arresting officer. The bullet entered through his mouth and lodged in the soft tissue near his spine where it remains to this day. Jackie Potts has never received adequate medical treatment for the wounds received during his arrest. In fact, tooth fragments that lodged in Jackie Potts' tougue as a result of the bullet passing through his mouth were removed by a fellow inmate using pliers and a razor blade. These tooth fragments were lodged in Potts' tongue for over three years.

Since his conviction, Jackie Potts has been incarcerated in the Georgia State Prison at Reidsville or at the Georgia Diagnostic and Classification Center at Jackson. The Georgia State Prison is presently under court order from United States District Court Judge Anthony Alaimo. A comprehensive report prepared by the federally appointed monitor has enumerated many unconstitutional medical conditions existing at the Georgia State Prison. The Federal District Court for the Middle District of Georgia has also found unconstitutional prison conditions of incarceration at the prison in Jackson. In addition, the State of Georgia has acknowledged and admitted that unconstitutional conditions existed at both prisons.

Jackie Potts has had to struggle with his physical and psychological pain while in an environment that in and of itself produced such pain. He has endeavored to come to terms with his past conduct, and to regain some control over his life.

The paths he has taken in an attempt to give his life purpose and justification are not at all unusual. He converted to Catholicism, seeking divine forgiveness. Many of

his subsequent actions may be viewed, like this one, as an attempt to do penance.

The dismissal of his attorneys after the Georgia Supreme Court denied review of his state post-conviction proceedings may be seen as a loss of hope or a willingness to accept society's punishment. But, Jackie Potts wants to live. His faith does not allow him to pursue any other course. Thus, even while Jackie Potts was refusing to oppose the State's actions to execute him, he was reaching out for life in the fullest sense.

Jackie was determined to accept the physical pain from the police officer's bullet. When presented with a long awaited opportunity to have medical attention, his mental anguish forced him to reject any help for his own pain. Through this action he tried to compensate for whatever pain he had caused others. As the date of his execution approached, Jackie Potts willed himself to accept the punishment of death. He was determined to face death with dignity and without regret.

Yet in the early evening hours of the day before his scheduled execution, Jackie Potts succumbed to the entreaties of his brother and filed his first federal habeas corpus petition. He later explained that he did not want his brother to feel responsible for his death.

The days leading up to Jackie Potts' decision to oppose his execution were marathons of visiting with friends and family, discussions and negotiations with prison officials for medical attention, and conferences with the press.

The ultimate decision to appeal was in complete contradiction to his decision to be executed; a decision he had mentally prepared to accept. Jackie Potts was prepared to cease to fight on June 5. Instead, he found his fight had escalated far beyond what it had been previously.

In the days following his June 4, 1980, decision to receive relief from his unconstitutional sentence of death, Jackie Potts was mentally fatigued and physically exhausted. In this weakened state he was forced to endure a tremendous alteration in the state of his incarceration. He became a focal point of institutional malice; his renewed desire to live enraged those who had prepared to see him die. The presence of family and friends was immediately restricted as the prison officials limited visits to one day a week for only four hours. There was purposeful and punitive harassment caused by prison officials. The ultimate symbol of his humiliation was a haircut given a day after the stay of execution was granted in the presence of a large group of jeering prison guards. The full force of the oppressive conditions at the Georgia State Prison bore down on the fatigued Jackie Potts.

Jackie was disturbed by the circus atmosphere surrounding his case, an atmosphere that embroiled his family and friends. His mother was not pleased with his decision to fight for his life in the federal courts. His mother complained in the media of the uncertainty of Jackie's fate. She told her son that he had done the wrong thing by not going through with the execution. She felt he should not suffer on death row any longer and she sought relief from the uncertainty of his fate.

In response to his mother's wishes, Jackie sent a note delivered by his mother to Judge O'Kelley stating his intent to dismiss his appeal. Judge O'Kelley scheduled a hearing to determine Jackie Potts' competence to dismiss his petition. At that hearing, an emotionally drained Jackie Potts refused the assistance of available counsel and surrendered to his mother's wish. Judge O'Kelley used Rule 11 of

the Federal Rules of Criminal Procedure to guide his determination of whether Jackie Potts was competent to dismiss his petition for federal habeas corpus. On the witness stand, Jackie Potts answered Judge O'Kelley's questions briefly, his face impassive.

The hearing itself lasted seventy-five minutes, including a twenty-three minute recess. Not one question was asked of either Jackie Potts or the Court by the State of Georgia during the brief hearing. The State of Georgia filed no responsive pleading.

During the brief recess in the hearing, Jackie Potts made a request through the United States Marshal's office asking to speak with Judge O'Kelley in his chambers.[4] Judge O'Kelley refused this request and made no attempt to determine the reason for the request. At the end of the hearing, Judge O'Kelley dismissed the petition from the bench and filed his written order on Friday, June 13, 1980. The new execution date was set for Tuesday, July 1, 1980.

On June 25, 1980, Jackie Potts filed a second habeas corpus petition in the Federal District Court for the Northern District of Georgia, Atlanta and Gainesville Divisions. Jackie Potts had reconfirmed his desire for life.

On June 26, 1980, Judge O'Kelley held a hearing to determine whether he would grant a stay of execution pending consideration of Jackie Potts' second habeas corpus petition. This petition was virtually identical to the petition that was dismissed on June 13, except for a comprehensive explanation for dismissing the first petition filed fourteen days earlier.

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[4] This request for a private discussion with the Court may have been the most obvious warning that something was not understood or going wrong that could not be explained in open court. Potts was proceeding pro se at this time and the Court should have been sensitive to his layman's request for a bench conference.

Additionally, counsel for Jackie Potts stated that the dismissal of the first petition was the result of mental fatigue and duress due to physical abuse by correctional officers. Counsel attempted to present evidence to support the reasons why Potts' had dismissed his earlier petition. Two psychologists, experts in the field of prison psychology and consultants on the conditions suit against the Georgia Diagnostic and Classification Center,were in the courtroom ready to give the Court the benefit of their experienced opinions. The testimony of these psychologists would have informed the Court of the coercive, brutal, inhumane treatment by prison officials of Jackie Potts. The psychologists would have explained the psychological fatigue that resulted from Jackie Potts' years of incarceration on death row in the Georgia prisons. The Court refused to allow the presentation of any of this evidence which would have explained Jackie Potts' dismissal and refiling of his habeas corpus petitions. Instead, the only explanation of Jackie Potts' duress and mental stress was through counsel's offer of proof and the verfied petition. The court refused to allow the testimony of Jackie Potts who was present in the courtroom.

Thus, the rulings of the Court excluded testimony from the record that would have shown that any action on the part of Jackie Potts in dismissing his earlier petition was due to his psychological fatigue and the duress resulting from the continual physical and psychological abuse he received at the hands of Georgia prison guards. Potts would have also shown he did not abuse the writ.

After the dismissal of the petition by the District Court and a denial of a stay of execution, petition was granted a stay of execution on June 28, 1980, by the United

States Court of Appeals for the Fifth Circuit. On July 1, 1980, This Court rejected the Warden's application to vacate the stay granted by the Court of Appeals.

The United States Court of Appeals for the Fifth Circuit has remanded the case back to the District Court for further hearings.

## REASON FOR NOT GRANTING THE WRIT

This Court should not grant review of the decision of the Court of Appeals for the following reason:

The remand by the Court of Appeals to the District Court for an evidentiary hearing on the issue of abuse of 28 U.S.C. §2254 and voluntariness of dismissal of prior 28 U.S.C. §2254 action was proper under the unusual factual circumstances in this case.

> The district court held that Potts intentionally abandoned his federal habeas corpus rights and that this rendered his subsequent petition an abuse of the writ. Despite Potts' allegations of reasons justifying his actions, and despite his proffer of evidence, the court did hold an evidentiary hearing. The narrow and important issue facing us on this appeal is whether or not the knowing and intentional waiver, pursuant to the classic definition enunciated in Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 2d 1461, of Potts' federal habeas corpus rights renders a subsequent petition an abuse of the writ, without regard to any justifiable reasons Potts may have had for initial waiver or subsequent petition. [Footnote omitted] Potts v. Zant, 638 F. 2d 742 (5th Cir. 1981).
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> During the hearing on June 26, Potts' attorneys maintained that if the district court was prepared to reject his second petitions for being an abuse of the writ, they had a right to present evidence explaining Potts' action and rebutting the state's pleading of abuse. The district court permitted Potts' attorneys a brief offer of proof in which they quickly were to explain Potts' actions. The district court, however, refused to grant an evidentiary hearing on any issue relevant to abuse. On the basis of the evidence addressed in the 'next friends' petition and in the June 10 hearing, the district judge was convinced that Potts had made an intentional and voluntary waiver of his right to federal habeas, and

> that this meant any subsequent petition was an abuse. We conclude that the court should have granted a hearing on the issue of abuse. Our holding in this matter is divided into two parts. In the first part, we discuss the law respecting the need for an evidentiary hearing with respect to the issue of abuse even assuming Potts' abandonment was indeed knowing and voluntary. In the second part, we discuss the need for an evidentiary hearing to determine the voluntariness of Potts' abandonment. By separating the issues to be determined in an evidentiary hearing into these two contexts, we hope to clarify the district court's task on remand.
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> Potts v. Zant, supra, at 747.

The approach taken by the Court of Appeals provides the Petitioner a full opportunity to show such abuse of the writ, if he can, at the hearing. At best, this case is not ripe for determination on the record now available. If the results reached by the District Court at the hearing are not satisfactory to the Petitioner, certainly then he can complain further with a full record, ripe for determination.

## CONCLUSION

For the above reasons shown, a writ of certiorari should not be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Millard C. Farmer
Pamela L. J. Arangno
Joseph M. Nursey
Andrea I. Young
15 Peachtree St., N.E.
Suite 831
(404) 688-8116

Frank Derrickson
Ralph Goldberg
Thomas McKee West
600 Healy Bldg.
57 Forsyth Street
Atlanta, Georgia 30303
(404) 524-1293

COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party, Mr. Arthur K. Bolton, Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334, with a copy of the foregoing by placing same in the U.S. Mail in a properly addressed envelope with adequate first-class postage attached thereon.

This 7th day of July, 1981.

Millard C. Farmer

COUNSEL FOR PETITIONER

15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303
(404) 688-8116